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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974
No. 74-572

ALBERT JOSEPH ANTICO,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Respondent, People of the State of California, respectfully prays that a writ of certiorari to review the judgment of the Appellate Department of the Superior Court of the State of California, County of Los Angeles,

entered against Petitioner in the above-entitled case on July 26, 1974, not issue.

OPINIONS BELOW

No written opinion was rendered by the Appellate Department of the Superior Court of The State of California for the County of Los Angeles on the judgment entered in the above-entitled action on July 26, 1974.

JURISDICTION

The judgment of the Appellate Department of the Superior Court for the State of California for the County of Los Angeles was entered July 26, 1974. A copy of the judgment appears in Appendix A of Petitioner's writ. A due and timely petition for rehearing or, in the alternative, for certification of the cause to the Court of Appeal was denied by the said Appellate Department on August 12, 1974. A copy of the said order appears in Appendix B of

Petitioner's writ.

By the aforesaid denial of the petition for rehearing or, in the alternative, for transfer to the Court of Appeal, the Appellate Department of the Superior Court of the State of California for the County of Los Angeles became the highest court of the State in which a decision could be had. See, California Penal Code section 1471; California Rules of Court, Rules 24(a) and 28(b); Smith v. California, 361 U.S. 147, 148, fn. 2; Virginia Rye Co. v. Mullins, 271 U.S. 220, 222.

This Honorable Court has clearly established that it should not take jurisidction to review a judgment where no opinion was delivered by the highest court of a state.

The Appellate Department of the Superior Court of Los Angeles County delivered no opinion in this case. Said Appellate Court, therefore, did not directly pass upon any federal questions.

As held by Stembridge v. Georgia, 343 U.S. 541, 547, 96 L.Ed. 1130, 72 S.Ct. 834 (1951):

> "Where the highest court of the state delivers no opinion and it appears that the judgment might have rested upon a non-federal ground, this court will not take jurisdiction to review the judgment. [Citations]."

Petitioner invokes the jurisdiction of this court under Title 28, U.S.C. section 1257(3). However, the judgment Petitioner seeks to have reviewed by this court became final on August 12, 1974. (California Rules of Court, Rule 107(b)(2); Market Street Railway Co. v. Railroad Com., 324 U.S. 548, 89 L.Ed. 1171, 65 S.Ct. 770)

Rule 22(1) of the Rules of the Supreme Court of the United States required that Peti-

tioner file his petition within ninety days of August 12, 1974. The ninetieth day after August 12, 1974, was Sunday, November 10, 1974. The petition was filed Tuesday, November 12, 1974. Respondent is unaware of any extension of time having been granted Petitioner, and therefore submits the petition was not timely filed.

QUESTIONS PRESENTED

1. Is a conviction for violation of California Penal Code section 311.2, possession of obscene matter with intent to exhibit it to others, violative of the Fourth and Fourteenth Amendments of the United States Constitution, where such possession was admittedly by a motel owner in the form of videotape cassettes to be shown over closed-circuit television from the motel office to motel rooms wherein guests paid additional rent for the privilege of viewing such matter?

2. Is a conviction resulting from admission of evidence seized pursuant to a search warrant violative of the Fourth and Fourteenth Amendments of the United States Constitution where a prior search warrant authorized the search for and seizure of evidence at an unknown location within a motel building, which prior search led to the discovery of Respondent's possession of such evidence within the motel manager's apartment adjacent to the office, on the alleged ground that said prior search warrant did not particularly describe the place to be searched?

3. Is a conviction for violation of California Penal Code section 311.2, possession of obscene matter with intent to exhibit it to others, violative of the Fourth and Fourteenth Amendments of the United States Constitution on the alleged ground that a search warrant authorizing such seizure issued on less than probable cause because the affidavit in support

thereof does not, on its face and independent of another warrant issued immediately prior thereto which did show probable cause, show anything more than private possession allegedly condoned by this court in Stanley v. Georgia, 394 U.S. 557, 22 L.Ed.2d 542, 89 S.Ct. 1243?

4. Was Petitioner's right to due process of law under the Fifth Amendment of the United States Constitution violated by the order granting probation on the alleged grounds that said order was ambiguous, unintelligible, overbroad, unreasonable, and in excess of the scope of the court's authority?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the First, Fifth, and Fourteenth Amendments of the United States Constitution and Article I, section 19, of the California Constitution, appear

in Appendix C of Petitioner's petition. The pertinent provisions of California Penal Code section 311.2 are:

> "(a) Every person who knowingly sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state possesses, prepares, publishes, or prints, with intent to distribute or to exhibit to others, or who offers to distribute, distributes, or exhibits to others, any obscene matter is guilty of a misdemeanor."

STATEMENT OF FACTS

Petitioner was charged in a misdemeanor complaint filed March 15, 1973, with violation of eight counts of California Penal Code section 311.2. On August 10, 1973, Petitioner was found guilty as to count six, and acquitted as

to five of the other counts. The jury was unable to reach a verdict on two counts, a mistrial was declared as to them and, when Petitioner was sentenced on September 27, 1973, they were dismissed on the trial court's own motion.

In February of 1973, Los Angeles Police Officer D. M. Feeley received information from another officer that the Hollywoodland Motel in the City of Los Angeles was showing hard-core pornography movies in its rooms by means of a videotape system in violation of California Penal Code section 311.2.

On March 2, 1973, Feeley saw an advertisement in the Los Angeles Free Press newspaper which stated:

> "Porno & Privacy now for your enjoyment hardcore films to your room via closed circuit T.V. Full color sound, complete privacy, water beds and mirrors too. The Hollywoodland Motel,

10730 Ventura Blvd. North Hollywood,
North Hollywood, California."

The next day Feeley called the motel and spoke to the manager, who stated:

"the ad states that the films are hardcore and that is just what they are."

At noontime on March 66, 1973, Feeley and a policewoman went to the Hollywoodland Motel and spoke to the manager. Feeley recognized this person to be the person to whom he spoke on the telephone. Feeley told the manager that he had heard the place had some "good" films. The manager stated, "Yes, you're right. This is the place." Feeley then asked the manager, "Do the films have sucking and fucking." The manager stated, "I have some films and they are real hard-core." Feeley asked the manager how this comes about. The manager

stated, "the films are on close circuit TV. All you have to do is turn on the television." Feeley asked the manager, "Do I have to put money into the television?" The manager stated, "No, all you do is pay for the room and turn on channel 6 and I plug you into the movie. It will cost you $17.00 for the both of you. I'll even give you a queen size bed." Feeley gave the manager $17.00 and signed the guest register under the name of Ken Howard. The manager gave Feeley a key to room #2 and stated the room was located around the corner along side the pool area. Feeley and the policewoman went to room #2 and opened the door. The room was in the process of being cleaned as the bed was unmade. Feeley returned to the manager's office and told the manager that room #2 was not available to rent. The manager then gave Feeley a key to room #4. The manager then picked up a telephone on a switchboard and stated to an

unknown person, "Disconnect room #2 and plug them into room #4." Feeley and the policewoman went to room #4, entered the motel room, turned on the television set to channel 6 and a picture appeared on the screen.

The officers then watched a number of pornographic films. During the viewing, the policewoman went to the manager's office to get some change for the cigarette machine. The manager asked her how she liked the films.

Officer Feeley composed an affidavit in support of a search warrant setting forth the above facts as well as a description of the films viewed. A municipal court judge issued a search warrant authorizing the search for and seizure of the films viewed, the TV set on which Feeley viewed them, and the equipment used by the manager to show them. The manager turned out to be the owner of the motel, who is the Petitioner here.

The warrant commanded an immediate daytime search describing the premises as,

"The Hollywoodland Motel located at 10730 Ventura Boulevard, North Hollywood, California. The premises is described as a two story stucco building located on the south side of Ventura Boulevard between Fruitland Drive on the west side and Willowcrest Avenue on the east side. The building is gold in color with pink and green doors on the rooms. The words Hollywoodland Motel in black lettering on a yellow background sign is above the entrance to the motel. A neon sign appears on a pole in front of the building with the words 'heated pool - Hollywoodland - steam baths - water beds.' There is a sign on the east side of the building stating Hollywoodland Motel, pools, kitchens, TV - Phones - Air conditioned. There are

two signs located on the west side of the location stating Hollywoodland Motel. This is the only business at this location."

In conducting the above search Feeley observed three reels of videotape not previously viewed. They were located in the manager's apartment which was located to the west of the main office of the motel. Feeley set forth this observation and a description of the reels' contents in another affidavit and another search warrant was issued, commanding seizure of the three additional reels. The matter contained in count six of the complaint, for which Petitioner was convicted, was seized pursuant to the second search warrant. One of the three films seized pursuant to the second warrant was being played on the equipment in the manager's apartment when Feeley conducted the search commanded by the first warrant; the film which formed the basis for

Petitioner's conviction was viewed by Feeley in order to determine if it was one of the films the seizure of which was commanded by the first warrant.

REASONS FOR DENYING THE WRIT

1. Petitioner was convicted of possession of obscene matter with intent to exhibit to others, a fact he freely admits. He contends that he should somehow vicariously share in the right of his motel room occupants to view obscene matters therein, which right, he contends, extends to such occupants by virtue of this court's opinion in Stanley v. Georgia, 394 U.S. 557 [22 L.Ed.2d 542, 89 S.Ct. 1243].

Respondent feels that Petitioner's contention that Stanley v. Georgia, supra, extends to motel room occupants viewing obscene matter under commercial circumstances such as exist here may be stretching that decision a little, but under California law such would not be

illegal anyway.

Petitioner's contention was clearly dealt with in United States v. Thirty-Seven Photographs, 402 U.S. 363, 326 [28 L.Ed.2d 822, 91 S.Ct. 1400]:

> "Whatever the scope of the right to receive obscenity adumbrated in Stanley, that right, as we said in Reidel, does not extend to one who is seeking, as was Luros here, to distribute obscene materials to the public, . . ."

Respondent submits that no legal authority exists (persuasive in this court, at least) for Petitioner's proposition that the circumstances of his case are so different from the situation where obscene matter is shown in a public theatre. In fact, it seems that showing such matter in a theatre is practically innocuous compared to exhibition at noontime in a motel

room admidst queen size water beds, mirrors and whatever. As previously stated, Petitioner was convicted of possession of obscene matter with intent to exhibit it to others. The fact that the others were admitted into motel rooms instead of theatres changes nothing.

2. Petitioner contends that the first search warrant failed to adequately describe the premises to be searched. This factual question was determined adversely to Petitioner in the trial court; the description was, in fact, quite complete and described a building at a particular address. Beyond that Petitioner seems to argue that the warrant was invalid because it authorized a search of the entire building. Probable cause for a search of the entire building existed because the exact location of the film and equipment within the building was unknown. Nothing was left to the officer's discretion.

Petitioner also seems to be attempting to

argue that the film seized, which was in fact taken from Petitioner's apartment in the motel, should have been excluded because of alleged violation of the rights of possible motel guests. Petitioner has not shown that his argument raises any federal question. (cf. Simmons v. United States, 390 U.S. 377, 19 L. Ed. 2d 1247)

3. Close analysis of Petitioner's contention regarding the second search warrant reveals that he is either arguing that the evidence was insufficient to sustain his conviction or that, considering the second warrant in a vacuum and completely out of context of the first warrant, probable cause for issuance of the warrant was not shown therefor. The first theory ignores the fact that Petitioner made no secret that his possession was not the kind contemplated in Stanley v. Georgia, supra, but was for the purpose of exhibiting it to others. The second theory ignores the

fact that the second warrant referred to and depended upon the first. Petitioner has made no showing that any federal question is presented by his wholly inadequate attempt to equate his situation with mere private possession of obscene matter and none is presented by the fact that he is able to draw different inferences from the evidence than did the trial court.

4. There was no denial of due process of law by the order granting Petitioner probation. The record in this case (Clerk's transcript, page 15) clearly shows that Petitioner accepted and understood the terms and conditions of probation noting only that he had "reservations" about being overly broad. Clearly the order was neither ambiguous nor unintelligible.

The allowable scope of authority of a California court in granting probation would not seem to raise any federal question. Similarly,

Petitioner's contentions regarding over-breath were considered and rejected in the state court. In the absence of some showing that sanctions have been imposed for violation of probation based on the extreme hypotheticals posed, no federal question is stated. (cf. United States v. Raines, 362 U.S. 17, 21-22, 4 L.Ed.2d 524, 80 S.Ct. 519)

CONCLUSION

For the foregoing reasons, Respondent submits that this Honorable Court should deny the writ.

Respectfully submitted,

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